

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Minority Business & Housing Development, Inc.)	File No. EB-06-NY-275
)	
Licensee of Station WYGG)	NAL/Acct. No. 200832380002
Asbury Park, New Jersey)	
Facility ID # 19867)	FRN: 0007512528
)	

FORFEITURE ORDER

Adopted: May 28, 2009

Released: June 3, 2009

By the Regional Director, Northeast Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of twenty-five thousand dollars (\$25,000) to Minority Business & Housing Development, Inc. (“MBHD”), licensee of FM radio station WYGG in Asbury Park, New Jersey, for willfully and repeatedly violating Section 1.1310 of the Commission’s Rules (“Rules”), by failing to comply with radio frequency radiation (“RFR”) maximum permissible exposure (“MPE”) limits applicable to facilities, operations, or transmitters;¹ Section 73.1350(a) of the Rules, by operating with an excessive antenna height from an unauthorized location;² and Section 73.3527(a) of the Rules, by failing to maintain a public inspection file.³

II. BACKGROUND

2. On November 16, 2006, an agent from the Commission’s New York Office monitored station WYGG on 88.1 MHz using an FCC direction finding vehicle and found that the station was operating from an antenna mounted on the roof of 601 Bangs Avenue, Asbury Park, New Jersey 07712, at coordinates 40° 13’ 01” north latitude and 074° 00’ 36” west longitude, approximately 83 meters west of the station’s authorized location. The antenna was mounted at a height of 43.9 meters AGL, which

¹ 47 C.F.R. § 1.1310. See also *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, ET Docket No. 93-62, 11 FCC Rcd 15123 (1996), *recon. granted in part, First Memorandum Opinion and Order*, 11 FCC Rcd 17512 (1996), *recon. granted in part, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494 (1997) (“*Guidelines*”).

² 47 C.F.R. § 73.1350(a).

³ 47 C.F.R. § 73.3527(a).

exceeded its authorized antenna height by 29.9 meters.⁴

3. After identifying the station's location, the agent then entered the building located at 601 Bangs Avenue and identified himself to the front desk clerk. The clerk indicated that he had a key to the roof and contacted the building manager, who escorted the agent to the roof. To access the roof, it was necessary to unlock a padlocked door that led into a poorly illuminated elevator equipment room, which was followed by an unlocked door leading outside to the lower level of the roof. The roof had an upper level, which could only be accessed by climbing a ladder mounted on the side wall. The agent observed WYGG's transmitting antenna approximately 8 feet above the upper roof level mounted on a pole approximately 3 feet away from the top of the ladder. The agent also observed a set of cellular antennas mounted on the side wall around the edges of the upper roof, and a set of 8 thick cables laid across the upper roof within several feet of WYGG's antenna. Using a personal RF safety monitor, the agent determined that there was an area near the top of the ladder leading to the upper roof that met or exceeded the general population RFR MPE limits. There were no warning signs or barriers on the rooftop to prevent access to the area in question. In response to questions, the building manager stated that workers routinely gain access to the roof by obtaining a key from the front desk or the office on the 11th floor and that workers recently accessed the roof to work on the cellular equipment. She also stated that she was unaware of any RFR hazards on the roof.

4. Immediately after the rooftop inspection on November 16th, the agent inspected WYGG's main studio, located on the 7th floor of the building. During the inspection, the agent observed that there was no public file, no chief operator designation, no station license posted, and very few station logs. The agent observed in the station's records a 2-year lease agreement which commenced on April 1, 2005, between the building owner and WYGG's station manager, for the lease of 601 Bangs Avenue, Suite 705. The lease also specified the installation of one antenna on the roof.⁵ The agent advised the station manager that MBHD was in violation of the FCC's Rules for operating from an unauthorized location and height, for excessive levels of RFR on the rooftop, for not having a public file, and detailed other violations found. The agent informed the station manager that these were many of the same violations for which MBHD received an NOV and forfeiture in 2002. The station manager admitted that the station did not have a public inspection file, that there was no designated chief operator, and that their contract engineer, who comes by occasionally, is the only one who knows anything about the transmission system or knows how to operate the EAS equipment. The manager stated that he was not aware of the RFR issue and he made no mention of any signs posted or procedures to follow regarding RFR.

5. On November 20, 2006, agents from the Commission's New York and Philadelphia Offices conducted a RFR survey of radio station WYGG on the rooftop of 601 Bangs Avenue, Asbury Park, New Jersey. Agents contacted building management, who instructed the agents to obtain the key for the padlocked door from the office on the 11th floor. After opening the padlocked door that led into

⁴ The Philadelphia Office previously issued a NAL to MBHD on December 30, 2002, in the amount of \$13,000 for unauthorized antenna height and no EAS equipment installed. See *Minority Business & Housing Development, Inc.*, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 200332400003 (rel. December 30, 2002). MBHD did not dispute the violations and after issuance of a Forfeiture Order and Memorandum Opinion and Order, MBHD paid the forfeiture on November 17, 2004. See *Minority Business & Housing Development, Inc.*, Forfeiture Order, 18 FCC Rcd 9422 (2003), Memorandum Opinion and Order, 19 FCC Rcd 8929 (2004). Prior to issuance of the NAL, Notices of Violation ("NOV") were issued by the FCC's Philadelphia Office on May 30, 2002 and July 24, 2002, citing MBHD for unauthorized antenna height and location, unauthorized antenna type, no public file, no EAS equipment installed, no station logs, and no chief operator designation or review. The July 24, 2002 NOV also cited MBHD for failure to respond to the first NOV.

⁵ During the 2002 investigation, building management for 601 Bangs Avenue stated that, based on engineering drawings, the WYGG antenna was mounted on the roof of the building 144 feet (43.9 meters) above ground level, which exceeds its authorized antenna height by 29.9 meters.

the elevator equipment room, the agents observed two small, inconspicuous signs near the unlocked door that led to the rooftop. One was a small RFR sign posted to the left of the door by a wireless service provider indicating that the RFR levels may exceed FCC Standards for general public exposure. The sign did not indicate which areas on the roof exceeded the public or general population limits. The second was a small white paper sign glued to the right of the access door advising of a "radio frequency hazard" and that "anyone who has to climb the ladder to the top out of this door please contact the radio station on 7th floor suite 705." Two phone numbers for the station were listed on the sign. Neither warning sign was clearly visible because the elevator equipment room was not illuminated. The view of the small white sign to the right of the access door was blocked by a large piece of electrical equipment.

6. The agents then proceeded to the upper rooftop to conduct RFR measurements. There were still no warning signs or barriers on the rooftop to prevent access to hazardous areas. Using a calibrated RFR meter, the agents determined that the occupational and general population limits were exceeded in an area about 5 feet around WYGG's antenna support pole. The agents made a total of 12 spatially averaged measurements one foot from WYGG's antenna support pole at a single location where the highest RFR levels were detected. The measurements showed that the RFR level was 158% of RFR MPE occupational limit, and 790% of the general population RFR MPE limit, or 1.58 mW/cm²

7. Immediately after making the RFR measurements, an agent contacted the station manager at one of the numbers listed on the warning sign. The agent stated to the station manager that workers were about to go on the roof and asked the manager if there were any hazards for persons working on the upper level roof. The manager indicated that there were no hazards on the roof but that the workers should not go too close to the antenna. The agent repeatedly informed the manager that men would be working near the antenna on the upper roof and asked if there would be a problem. The manager stated that the antenna has been up there for 5 or 6 years and that people had worked on the roof before and nothing happened. The agent called the manager back about 10 minutes later, explained that he was still concerned about RFR from the antenna, and asked if it would be possible to temporarily turn off the power to the station so that the men could work safely on the roof. The manager said that he would ask the station operators to turn off the station. A few minutes later, the manager called the agent back and said he was going to the station himself to turn off the station. Shortly thereafter, the manager called the agent again, stating that he was at the studio and was turning off the station for 30 minutes. The agent asked the manager if it would be safe for the men to go to the upper roof, and the manager said that it would. The agents then observed that the radio transmitter for station WYGG was still operating.

8. Several minutes later, the station manager came to the rooftop. When agents asked why the power to the station was not turned off after he agreed to do so, the manager explained that he thought that turning off the audio to the radio station was sufficient. The agents explained that the transmitter itself must be turned off in order to eliminate the RFR emanating from the antenna. After the WYGG transmitter was turned off, the agents conducted additional RFR measurements in the same location under WYGG's antenna with the calibrated RFR meter. No RFR emissions were detected when station WYGG was off the air, which indicated that WYGG was responsible for 100% of the emissions measured earlier. Therefore, the RFR emissions from WYGG were 158% of RFR MPE occupational limit, and 790% of the general population RFR MPE limit, or 1.58 mW/cm². The agents explained to the manager that the RFR levels due to WYGG's transmission exceeded the occupational and general population MPE limits, creating an RFR hazard, and that the problem should be addressed as soon as possible. The agents also advised the manager that, in addition to the RFR violations, the station was still in violation for operating at an unauthorized location and height.

9. On November 21, 2006, an agent from the New York Office called the licensee, MBHD, and spoke to MBHD's Executive Director, Dr. Philius Nicholas. The agent explained all the violations found and noted that these were some of the same violations cited in the NOV's and NAL issued in 2002. Dr. Nicholas stated that he previously submitted an application to move WYGG to 601 Bangs Avenue, at an increased height and lower power. The agent explained that WYGG was never authorized to operate

from that location and height and FCC records show that the construction permit application (File No. BPED-20020808ADH) was never granted and was in fact dismissed per the applicant's request.

10. On January 30, 2007, agents conducted an inspection of WYGG at its new facility, which it was operating from pursuant to a Special Temporary Authority ("STA") granted by the Audio Service Division on January 4, 2007.⁶ The agents determined that the station was operating at the location, antenna height, and power authorized by the STA. The STA letter and chief operator designation were posted at the studio, and there were labeled folders in the public file for all required elements, but the file was incomplete. Specifically, there were no quarterly issues/programs listings in the file. The transmitting antenna was located on the roof of a building next door to 414 Asbury Avenue, mounted on a pole approximately 20 feet above the roof at the south west corner of the building. The agents used a calibrated RFR meter to determine if any areas on the roof exceeded the public or occupational RFR MPE limits. The agents conducted several sets of spatial average measurements under the WYGG antenna, and determined that the levels were in compliance with the occupational and general population RFR MPE limits.

11. On December 20, 2007, the New York Office issued a Notice of Apparent Liability for Forfeiture ("NAL") in the amount of \$25,000 for the violations found at 601 Bangs Avenue. Specifically, the New York Office found that MBHD apparently willfully and repeatedly violating Section 1.1310 of the Rules by failing to comply with the RFR maximum permissible exposure MPE limits; Section 73.1350(a) of the Rules by operating with an excessive antenna height from an unauthorized location; and Section 73.3527(a) of the Rules, by failing to maintain a public inspection file. In its response to the NAL, MBHD seeks a "significant reduction" in the proposed forfeiture on the ground that it did not intentionally commit the violations and that it has made significant efforts to come into compliance with the Commission's Rules. In addition, MBHD submits a Declaration from the WYGG consulting engineer that addresses each of the findings in the NAL.⁷

III. DISCUSSION

12. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁸ Section 1.80 of the Rules,⁹ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Forfeiture Policy Statement").¹⁰ In examining MBHD's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹¹

⁶ See File No. BSTA-20070104ACJ. On April 3, 2007, MBHD submitted an application for an extension of the STA, File No. BESTA-20070403ACK, and an application for Construction Permit, File No. BPED-20070403ABV, to operate station WYGG from the new facility at 414 Asbury Avenue. On July 23, 2007, the Audio Division granted MBHD a 36-month Construction Permit. As of the release date of this order, MBHD continues to operate WYGG at 414 Asbury Avenue pursuant to an STA.

⁷ Declaration of Neal Newman, dated January 29, 2008.

⁸ 47 U.S.C. § 503(b).

⁹ 47 C.F.R. § 1.80.

¹⁰ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

¹¹ 47 U.S.C. § 503(b)(2)(E).

A. Compliance with RFR Limits

13. We disagree with MBHD's assertion that it did not violate the Commission's RFR limits. MBHD does not dispute the agents' measurements, which showed that the area near the WYGG antenna exceeded the general population/uncontrolled RFR MPE limits. Rather, MBHD claims that the general population/uncontrolled RFR MPE limits do not apply here because the general population did not have access to the roof. In support of its claim, MBHD's engineer submits that he personally was not able to access the roof and therefore, he argues, the general public could not possibly gain access. The fact that the station's consulting engineer personally did not know how to access the antenna is irrelevant.¹² As we explained in the *NAL*, the general population/uncontrolled RFR MPR limits applied in this case because the roof where WYGG's antenna was located was accessible by workers who were not aware of their potential for exposure and could not exercise control over it.¹³ That is, we found in the *NAL* that there was an "uncontrolled" environment on the roof, not that the general population had access to the roof.

14. Our finding that the general population/uncontrolled RFR MPR limits applied was based on several pieces of evidence in the record. First, the building manager and station manager admitted to the agents that they were not aware of the RFR hazard. Second, the building manager and station manager reported that workers routinely accessed the roof. Third, although warning signs were posted inside near the roof access door, these signs were inconspicuous due to poor illumination and a large piece of electrical equipment blocked the view of one of the signs. Fourth, the areas on the rooftop that exceeded the general population RFR MPE limit were not marked in any way. Because MBHD has not submitted any evidence demonstrating that the workers who accessed the roof were aware of the RFR hazards and could exercise control over their exposure, we conclude that we appropriately applied the general population/uncontrolled RFR MPE limits in this case.¹⁴ The agents found that the RFR emissions greatly exceeded the general population MPE on November 16 and 20, 2006, and we therefore conclude that MBHD willfully and repeatedly violated Section 1.1310 of the Rules by failing to comply with the RFR MPE limits applicable to facilities, operations, and transmitters.¹⁵

¹² MBHD's engineer states in his Declaration that "I submit that the FCC inspector was able to gain access because he was a federal agent." See Declaration at 4. Our finding that the general population/uncontrolled RFR MPE limits apply is not based on the fact that the FCC agent was able to access the roof. Our finding is based on the fact that the building manager and station manager reported that workers routinely accessed the roof and that workers were not properly warned about the RFR hazards.

¹³ See *NAL* at para. 16. In situations where the general public may be exposed, or where persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure, the general population/ uncontrolled MPE limits apply. See 47 C.F.R. § 1.1310, Note 2 to Table 1.

¹⁴ Our finding here is consistent with the Commission's recent decision in *Infinity Broadcasting Corporation of Florida* in which the Commission affirmed the assessment of a forfeiture for violation of the RFR MPE limits and found, *inter alia*, that it was appropriate to apply the public MPE limits where access to the area of concern was restricted, but no visible signage or markings existed to make workers and employees entering the area of concern even aware of their exposure, let alone enable such workers or employees to exercise control over their exposure to high RFR fields in the area of concern. *Infinity Broadcasting Corporation of Florida*, Order on Review, 47 P&F 754 (April 7, 2009) para. 19.

¹⁵ Although our findings here with regard to violations of the RFR MPE limits are not based on the fact that the station manager did not know how to turn off the transmitter, we note that his inability to do so is relevant to whether MBHD is able to comply with the requirement in its station license that it be able to "reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guideline." It is particularly troubling that the station manager is unable to turn off the transmitter given that MBHD's consulting engineer, who claims that he is the only one who knows how to operate the transmitter, also reports that he has a full-time job maintaining eight major market stations. See Declaration at 4.

B. Station Location and Antenna Height

15. We reject MBHD's contention that it was operating from 601 Bangs Avenue, Asbury Park, New Jersey, pursuant to a valid license. At the time of the inspections in 2006, the station's license (File No. BLED-19940304KZ) authorized WYGG to operate at 517 Cookman Avenue, with an antenna height of 14 meters above ground level ("AGL") and height above average terrain ("HAAT") of 10 meters at the coordinates 40° 13' 01" north latitude and 074° 00' 33" west longitude.¹⁶ As detailed in the *NAL*, on November 16 and 20, 2006, agents found that WYGG was operating from an antenna mounted on the roof of 601 Bangs Avenue at a height of 43.9 meters AGL and a HAAT of approximately 40 meters at coordinates 40° 13' 01" north latitude and 074° 00' 36" west longitude. The "license" that MBHD's engineer refers to in support of his claim that WYGG was operating pursuant to a valid license (BPED-19980417ID) was a three-year construction permit that expired on May 18, 2002. MBHD has not submitted any other documentation in support of its claim that it had authority to operate from 601 Bangs Avenue. We therefore find that, by operating with an excessive antenna height from an unauthorized location, MBHD willfully and repeatedly violated Section 73.1350(a) of the Rules, which requires that a licensee operate in accordance with the terms of its station authorization.¹⁷

C. Public Inspection File

16. We find no basis for cancelling the forfeiture proposed for failure to comply with the Commission's public inspection file rules. On November 16, 2006, an agent inspected WYGG's main studio and found that the station did not maintain a public inspection file. During the inspection, the station manager admitted that the station did not have a public inspection file.¹⁸ In his Declaration, MBHD's consulting engineer claims that he kept the public file in his desk drawer and that station management did not know where he kept the file.¹⁹ Even assuming that a complete file was in the engineer's desk drawer, the mere fact that a file exists does not constitute compliance with Section 73.3527(c) of the Rules, which requires that the public file "shall be available for public inspection at any time during regular business hours." Therefore, at a minimum, MBHD willfully failed to make its public inspection file available to the agent on November 16, 2006, as required by Section 73.3527(c) of the Rules. We ultimately find, however, that the engineer's statement, which is made without any supporting documentation and which is in direct contradiction to the statement of the station manager, is totally without merit. Accordingly, we conclude that MBHD willfully and repeatedly violated Section 73.3527(a) of the Commission's Rules by failing to maintain a public inspection file.

D. Forfeiture Amount

17. We find that MBHD's request for a "significant reduction" in the forfeiture amount is without merit. First, we decline to reduce the forfeiture amount based on MBHD's claim that it did not intend to violate the rules. To assess a forfeiture penalty, Section 503(b)(1) of the Act requires that we determine

¹⁶ Although MBHD's engineer claims that license BLED-1994030KZ expired in 1998, the license was in fact renewed in 2000 (File No. BRED-19980420YA) and again in 2006 (File No. BRED-20060125AGT).

¹⁷ MBHD does not dispute that it was operating with its antenna at an unauthorized height. We note that a \$5,000 forfeiture was proposed in the *NAL* for operating with an unauthorized antenna and at an unauthorized location. Under Section 1.80 of the Rules, 47 C.F.R. § 1.80, the base forfeiture amount for exceeding an authorized antenna height is \$5,000. Therefore, even if we accepted MBHD's claim that it was operating from an authorized location, there would not be any reduction in the forfeiture amount.

¹⁸ We do not address here whether WYGG was properly maintaining its public inspection file during the agents' inspection on January 30, 2007, because our findings with regard to the station's public inspection file at 601 Bangs Avenue alone warrant the proposed \$10,000 forfeiture.

¹⁹ Declaration at 1.

that the subject “willfully or repeatedly” violated the rules. The Commission has long held that violations resulting from inadvertent error or failure to become familiar with the FCC's requirements are willful violations and that “willful” does not require a finding that the rule violation was intentional.²⁰ Rather, the term “willful” means that the violator knew that it was taking (or not taking) the action in question, irrespective of any intent to violate the rules. In any event, because we find here that MBHD’s violations of Section 1.1310, Section 73.1350(a), and Section 73.3527(a) were repeated, we do not also need to make a determination that they were willful.²¹ We likewise decline to take into consideration the “ongoing efforts that WYGG has made to become FCC compliant.” The Commission has consistently held that a licensee is expected to correct errors when they are brought to the licensee's attention and that such correction is not grounds for a downward adjustment in the forfeiture.²²

18. In sum, we have examined MBHD’s response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that MBHD willfully and repeatedly violated Section 1.1310, Section 73.1350(a), and Section 73.3527(a) of the Rules and that the \$25,000 forfeiture proposed in the *NAL* is warranted.

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission’s Rules, Minority Business & Housing Development, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for violations of Section 1.1310, Section 73.1350(a), and Section 73.3527(a) of the Rules.²³

20. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Minority Business & Housing Development, Inc. shall also send electronic notification on the date said payment is made to NER-Response@fcc.gov.

²⁰ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088 (1992) (“*PJB Communications*”); see *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (“*Southern California*”) (stating that “inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”); *Standard Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 358 (1986) (stating that “employee acts or omissions, such as clerical errors in failing to file required forms, do not excuse violations”).

²¹ See e.g., *ESI Companies, Inc.*, Forfeiture Order, 19 FCC Rcd 17744 (2004), citing *KOKE, Inc.*, 23 FCC 2d 191 (1970).

²² See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21875-76 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994).

²³ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4), 1.1310, 73.1350(a), 73.3527(a).

21. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to Minority Business & Housing Development, Inc. at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

G. Michael Moffitt
Regional Director, Northeast Region
Enforcement Bureau